RECORD
AND
BRIEFS

No. 16-1276

IN THE

# Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,

*Petitioner,*

v.

PAUL SOMERS,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

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## BRIEF *AMICUS CURIAE* OF THE CENTER FOR WORKPLACE COMPLIANCE IN SUPPORT OF PETITIONER

The Center for Workplace Compliance respectfully submits this brief as *amicus curiae*.[1] The brief supports the position of Petitioner before this Court and thus urges reversal of the decision below.

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

## INTEREST OF THE *AMICUS CURIAE*

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of equal employment opportunity and workplace compliance. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and requirements.

Many of CWC's member companies are publicly traded corporations subject to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, codified in relevant part at 15 U.S.C. § 78u-6, and thus are potential respondents to whistleblower retaliation complaints filed under Section 922(a) of the Act. They also are subject to the Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107-204, 116 Stat. 745, as well as varying levels of regulation and enforcement by federal government agencies.

For instance, all of CWC's member companies are employers subject to the federal employment nondiscrimination statutes enforced by the U.S. Equal Employment Opportunity Commission (EEOC), including Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimina-

tion in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*; the Equal Pay Act (EPA), 29 U.S.C. § 206(d); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C. §§ 2000ff *et seq.* They are also covered by the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 *et seq.*, both of which are enforced by the U.S. Department of Labor's Wage and Hour Division. Many CWC members also are federal government contractors subject to the affirmative action requirements of Executive Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended, and its implementing regulations under 41 C.F.R. ch. 60, as well as Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. §§ 4211 *et seq.* Those requirements are enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs. Each of these laws contains express or implied workplace retaliation protections.

Accordingly, the issue presented in this case is extremely important to the nationwide constituency that CWC represents. The Ninth Circuit ruled incorrectly that the anti-retaliation protections contained in Section 922(a) of Dodd-Frank, 15 U.S.C. § 78u-6(h)(1)(A), cover individuals who complain internally to their employers about securities law violations, but never communicate those concerns externally to the Securities and Exchange Commission (SEC). Petitioner contends, correctly, that because Section 922(a)'s plain text clearly and unambiguously defines "whistleblower" to include only employees who report potential securities law violations to the SEC, the decision below cannot stand. This Court's resolution

of whether an employee who only reports alleged violations internally, and not externally to the SEC, has a cause of action for retaliation under Section 922(a) will have substantial legal and practical impacts on all publicly traded corporations subject to Dodd-Frank.

CWC has participated in numerous cases addressing the scope of federal workplace anti-retaliation statutes. See, e.g., *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1 (2011); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008). Because of its experience in these matters, CWC is especially well-situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

## STATEMENT OF THE CASE

Respondent worked as a vice president of portfolio management for Petitioner, a real estate investment trust that owns, acquires, and develops data centers. Pet. App. 14a. Prior to the termination of his employment in April 2014, Respondent allegedly made several reports internally to senior management regarding possible securities law violations, including accusing his supervisor of eliminating certain internal controls required by the Sarbanes-Oxley Act of 2002 (SOX), Pub. L. No. 107–204, 116 Stat. 745, and engaging in other misconduct. *Id.* It is undisputed that Respondent never reported this information to the Securities and Exchange Commission (SEC). Pet. App. 15a.

Respondent sued Petitioner in federal court, accusing the company of violating the Dodd-Frank Wall

Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, by firing him for complaining internally about alleged SOX violations. Pet. App. 12a-13a. Petitioner moved to dismiss the action on the ground that Respondent is not a "whistleblower" as that term is defined in Section 922(a) of Dodd-Frank, because he only complained about the alleged securities law violations internally, and not externally to the SEC. Pet. App. 17a.

The district court denied the motion. Pet. App. 13a. It found that the definition of "whistleblower" in Section 922(a) of Dodd-Frank is inconsistent with the Section's anti-retaliation provision, which protects not only SEC complainants but also individuals who "mak[e] disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 ... and any other law, rule, or regulation subject to the jurisdiction of the Commission." Pet. App. 6a (citation omitted). Unable to reconcile the two, the trial court deferred to the SEC's interpretation that Section 922(a)'s anti-retaliation protection extends to an employee who makes an internal complaint but fails to report to the SEC (and thus does not meet the statutory definition of "whistleblower"). Pet. App. 41a-43a. Recognizing that there is a "serious split in authority" on this issue, however, the trial court certified its order for interlocutory review by the Ninth Circuit. Pet. Cert. 7.

On Petitioner's interlocutory appeal, a divided Ninth Circuit panel affirmed. Pet. App. 3a. Like the trial court, the Ninth Circuit accorded great deference to the SEC's view that despite the narrow definition of whistleblower in Section 922(a), its anti-retaliation provision should be interpreted broadly to extend to employees who make internal complaints but never report to the SEC. Pet. App. 10a-11a. Petitioner filed

a Petition for Writ of Certiorari, which this Court granted on June 26, 2017.

## SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly held that Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 78u-6(h)(1)(A), protects individuals from retaliation when they report an alleged securities law violation internally, but not externally to the Securities and Exchange Commission (SEC). It accorded undue deference to the SEC's interpretation based on its belief that the statute is ambiguous as to the scope and meaning of the term "whistleblower." To the contrary, the statutory language is clear and unambiguous; it only protects "whistleblowers," defined as only those who report securities violations directly to the SEC, including through the filing of certain financial and other disclosures under the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A.

Congress has enacted numerous federal laws that provide broad protections to individuals who blow the whistle on corporate misconduct. It adopted a markedly more restrictive approach in Dodd-Frank, limiting its scope to narrowly defined "whistleblowers." Congress consciously and deliberately chose not to do in Dodd-Frank what it has done in numerous federal laws containing expansive anti-retaliation protections for individuals who blow the whistle on corporate misconduct.

Even if this Court were to find that Dodd-Frank's anti-retaliation provision is ambiguous, controlling deference to the SEC's interpretation would be unwarranted. Specifically, the SEC published a final rule fundamentally altering the statutory definition of

whistleblower, without providing the public with prior notice or an opportunity to comment on its interpretation. This Court has held that such rules are interpretive, not legislative, and therefore are not entitled to *Chevron* deference. Nor is deference warranted under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), because the SEC's interpretation is not persuasive or well-reasoned and, in fact, conflicts directly with the statute's plain text.

Finally, allowing the Ninth Circuit's interpretation to stand would significantly burden employers by substantially increasing the likelihood of having to defend themselves simultaneously in multiple, duplicative whistleblower proceedings. Such an interpretation also is unnecessary. Enforcing the anti-retaliation provision as mandated by Congress would in no way harm employees who only report alleged securities law violations internally to their employers, because such activity is expressly protected against retaliation elsewhere, namely under SOX.

## ARGUMENT

### I. INDIVIDUALS WHO ONLY REPORT ALLEGED SECURITIES VIOLATIONS INTERNALLY TO THEIR EMPLOYER, AND NOT EXTERNALLY TO THE SEC, DO NOT QUALIFY AS "WHISTLEBLOWERS" UNDER SECTION 922(a) OF DODD-FRANK

This case turns on the proper meaning and application of the term "whistleblower" as it is used in the Dodd-Frank Wall Street Reform and Consumer Protection Act's anti-retaliation provision. 15 U.S.C. § 78u-6(h)(1)(A). The Ninth Circuit incorrectly held that individuals who report potential securities

violations internally to their employers only, and not also (or alternatively) to the Securities and Exchange Commission (SEC), are "whistleblowers" entitled to the Act's anti-retaliation protections. Because its holding is contrary to the statutory definition of "whistleblower," which applies only to SEC complainants, the decision below is erroneous and should be reversed.

### A. Dodd-Frank's Definition Of Whistleblower Applies Only To Individuals Who Complain Externally To The SEC

Dodd-Frank was passed by Congress in an effort to build upon and enhance protections it put into place in 2002, when it enacted the Sarbanes-Oxley Act (SOX), Pub. L. No. 107-204, 116 Stat. 745, in the wake of several highly-publicized scandals involving fraud at publicly-traded companies, including Enron. Among other things, SOX imposes on publicly traded companies certain corporate responsibility and financial disclosure requirements. Section 806(a) of SOX created 18 U.S.C. § 1514A, which established a new cause of action prohibiting whistleblower retaliation by publicly traded companies against covered individuals who provide information related to certain securities law violations to a federal agency, Congress, or internally to the company.

In 2010, following the financial crisis of 2008, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376, which also contained strong anti-retaliation protections for whistleblowers. Section 922(a) defines "whistleblower" as

> [A]ny individual who provides, or 2 or more individuals acting jointly who provide, infor-

> mation relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.

15 U.S.C. § 78u-6(a)(6). Section 922(a) also provides as follows:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower –
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. [§] 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

Congress's goal in enacting Section 922(a) was to establish "a new, robust whistleblower program designed to motivate people who know of securities law violations *to tell the SEC*." S. Rep. No. 111-176, at 38 (2010) (emphasis added). To that end, Section 922(a) also contains monetary incentives for reporting to the SEC to "motivate potential whistleblowers to

come forward and help the *Government* identify and prosecute fraudsters." *Id.* at 112 (emphasis added). Congress never expressed a need to increase or incentivize *internal* reporting through the creation of Section 922(a) nor did it amend SOX for that purpose.

A "whistleblower" under Section 922(a) is any individual who provides information pertaining to a securities law violation to the SEC. The SEC's regulations establish the procedures whistleblowers must follow in doing so. 17 C.F.R. § 240.21F-9. They provide that "[t]o be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. § 78u-6(h)), you must submit your information about a possible securities law violation" either through the SEC's website or by mail or fax to the SEC Office of the Whistleblower using a specific SEC form. *Id.*

### B. Only Whistleblowers May Invoke Section 922(a)'s Anti-Retaliation Protections

Proper interpretation of Dodd-Frank's anti-retaliation provision "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006). The "cardinal principle" of statutory interpretation is that courts "must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (citations and internal quotations omitted). Accordingly, the definitions and anti-retaliation sections must be read together for Section 922(a) as a whole to make any sense.

The anti-retaliation provision provides that "[n]o employer may discharge ... or in any other manner discriminate against, a *whistleblower* ... because of

any lawful act done by the *whistleblower* ...." 15 U.S.C. § 78u-6(h)(1)(A) (emphasis added). As is evident from its title, *Securities whistleblower incentives and protection*, this provision protects a "whistleblower" who engages in any of the three types of conduct articulated in the statute. If an individual does not qualify as a whistleblower, the inquiry should end there. See *Asadi v. G.E. Energy (USA), LLC.*, 720 F.3d 620 (5th Cir. 2013) (finding that only individuals who provide information to the SEC qualify as whistleblowers and are protected under the anti-retaliation provision in Section 922(a)).

The term "whistleblower" is used not once but twice in the anti-retaliation provision.[2] If Congress intended to extend anti-retaliation protections expansively to include individuals other than statutory "whistleblowers," it would have, and in other contexts explicitly has, used different terminology. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (protecting any employee or applicant who "opposes any practice" from retaliation). See infra Section I.C. Congress chose not to do so here. Accordingly, the anti-retaliation provision's scope is limited by the statutory definition of whistleblower. See, e.g., *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (reading the same term used in different parts of the same Act to have the same meaning).

The Ninth Circuit concluded that the third clause of Section 922(a) confers anti-retaliation protections upon a whole class of employees who do not meet the statutory definition of "whistleblower." But subsec-

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[2] The term "whistleblower" also is used elsewhere throughout Section 922(a). See, e.g., 15 U.S.C. §§ 78u-6(b)(1), 78u-6(c)(1)(B), 78u-6(c)(2), 78u-6(d), 78u-6(e), 78u-6(g)(2)(A), 78u-6(g)(5), 78u-6(h), and 78u-6(i).

tion (iii) only protects "whistleblowers" who make "disclosures" that are "protected or required" by SOX. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. SOX outlines a variety of disclosures that are required or protected, including a code of ethics disclosure, 15 U.S.C. § 7264, disclosure that the company's audit committee includes a financial expert, 15 U.S.C. § 7265, conflict of interest disclosures, 15 U.S.C. § 78o-6(b), and real-time issuer disclosures whenever there is any material change. 15 U.S.C. § 78m. An employee has a statutory obligation to blow the whistle on his company *to the SEC* if he knows that the company has failed or intends to fail to make these required disclosures, and the SEC may initiate, and has pursued, enforcement actions against companies and individuals for failing to make these required disclosures. See, e.g., *In the Matter of BlackRock Advisors, LLC and Bartholomew A. Battista*, File No. 3-16501 (SEC 2015).

Moreover, where an employee reports a securities violation to his company's internal audit committee, then anonymously (unbeknownst to his employer) to the SEC – thus becoming a statutory whistleblower – subsection (iii) provides him with legal recourse if he is fired by his employer because of his internal complaint. In other words, he would qualify as a whistleblower because he reported to the SEC, but he is protected from retaliation under subsection (iii) because he made a required disclosure under SOX to his employer's internal audit committee.

Because the anti-retaliation provision in Section 922(a) only applies to "whistleblowers," defined in the Act as individuals who report alleged securities law violations to the SEC, individuals who only report internally have no cause of action under Dodd-Frank.

### C. If Congress Intended To Expand Section 922(a)'s Scope, It Would Have Used Broader Language As It Has In Other Anti-Retaliation Statutes

Where Congress has wanted to extend broader anti-retaliation coverage to cast a wider net of protection, it has expressed that intention in the plain language of the statute. There are more than twenty separate federal laws that provide anti-retaliation protection for corporate whistleblowers. See, e.g., Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; Energy Reorganization Act of 1974, 42 U.S.C. § 5851; FDA Food Safety Modernization Act, 21 U.S.C. § 399d; Federal Railroad Safety Act, 49 U.S.C. § 20109; Federal Water Pollution Control Act, 33 U.S.C. § 1367; International Safe Container Act, 46 U.S.C. § 80507; National Transit Systems Security Act, 6 U.S.C. § 1142; Occupational Safety and Health Act, 29 U.S.C. § 660(c); Pipeline Safety Improvement Act, 49 U.S.C. § 60129; Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Seaman's Protection Act, 46 U.S.C. § 2114; Surface Transportation Assistance Act, 49 U.S.C. § 31105; Toxic Substances Control Act, 15 U.S.C. § 2622; and Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121. Congress has also protected employees from retaliation under a number of employment law statutes. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a); Fair Labor Standards Act, 29 U.S.C. § 215; Americans with Disabilities Act, 42 U.S.C. § 12203(a). These wide-ranging whistleblower protections confirm that Congress knows how to draft anti-retaliation language that protects both broad and narrow categories of individuals depending on the intent of the statute in question.

For example, Title VII contains a very broad anti-retaliation provision that provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Thus, Title VII protects from retaliation those who "oppose" discriminatory employment practices, as well as those who file discrimination charges or otherwise "participate" in Title VII investigations, proceedings, or hearings. *Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271 (2009). Likewise, the Americans with Disabilities Act provides:

> No person shall discriminate against *any individual* because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

42 U.S.C. § 12203(a) (emphasis added).

In 2005, Congress amended the Energy Reorganization Act of 1974 to explicitly protect from retaliation employees who file *internal* complaints with their employers. 42 U.S.C. § 5851(a). Here, Congress could have elected to specifically protect employees who file internal complaints, rather than expressly limit-

ing Section 922(a)'s anti-retaliation protections to "whistleblowers" who report only to the SEC.

That Congress acted deliberately is also evident when looking at the anti-retaliation provision contained in Section 1057 of Dodd-Frank. 12 U.S.C. § 5567. Section 1057 protects "any covered employee" who provides information to the government (federal, state, or local) *or internally to his employer* that he reasonably believes constitutes a violation of the Consumer Financial Protection Act of 2010 or any other provision of the law that is subject to the jurisdiction of the Consumer Financial Protection Bureau. 12 U.S.C. § 5567(a)(1). There, Congress chose to protect "any covered employee," including those employees who only complain internally. Despite the fact that both sections are part of the Dodd-Frank Act, Section 922(a)'s anti-retaliation language is more narrow, strongly suggesting that Congress intended to provide different protections in different parts of the Act. See *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[W]hen Congress includes particular language in one section of a statute but omits it in another ... this Court presume[s] that Congress intended a difference in meaning") (citation and internal quotations omitted).

### D. Congress's Intent To Protect Only Those Who Complain Externally To The SEC Is Evident From Dodd-Frank's History, Structure And Operation

Dodd-Frank plainly was intended to protect (1) "whistleblowers," as so defined, from (2) retaliation for (3) engaging in statutorily protected conduct. That intention is evident, beginning with the title of the provision, "[p]rotection of whistleblowers" and "prohibition against retaliation." See *Fla. Dep't of Revenue*

*v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) ("statutory titles and section headings 'are tools available for the resolution of a doubt about the meaning of a statute'") (citing *Porter v. Nussle*, 534 U.S. 516, 528 (2002)); cf. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) (finding the statutory headings and titles were not dispositive in this specific instance where, unlike here, the statutory text was more detailed in its coverage than the narrow title of the section). There is no reason or indication to suggest that Congress intended that the anti-retaliation provision, which it included in the same statutory section, use a different definition of whistleblower than the one contained in the definitions section.

### 1. Dodd-Frank's legislative history confirms that Congress enacted the anti-retaliation protections in Section 922(a) to protect only individuals who report to the SEC

The district court below found, and the Ninth Circuit agreed, that "apart from the definition of whistleblower itself," Pet. App. 37a, the legislative history contains no indication that Congress intended to limit Dodd-Frank's whistleblower protections to external reports. To the contrary, Dodd-Frank's legislative history further confirms that its anti-retaliation protections were intended to extend only to activity related to SEC enforcement.

Indeed, one of the key reasons for establishing the whistleblower protection program in the Dodd-Frank Act was to assist the SEC in identifying securities violations and prevent further financial crises. S. Rep. No. 111-176, at 110 (2010). The legislative history references testimony suggesting that whistleblower tips to the SEC are thirteen times more effective

at uncovering fraud schemes in public companies than routine SEC audits.[3] *Id.* Expanding the anti-retaliation provision to protect individuals who never report to the SEC does nothing to achieve the purpose of the statute – to enhance and focus SEC enforcement efforts.

### 2. Dodd-Frank's monetary incentives are available only to employees who report both internally to their employers and externally to the SEC

The Ninth Circuit's contention that the language of subsection (iii) reflects a Congressional intent to incorporate all of SOX's protections so as not to leave internal complainants without legal recourse is unfounded. A more sensible reading is that subsection (iii) is intended to confirm that a statutory whistle-blower remains protected from retaliation for raising his concerns internally, even where his employer is unaware of his disclosure to the SEC. It is not hard to imagine a situation where an employee reports anonymously to the SEC and then, frustrated with inaction or bureaucratic delays, complains internally to his employer. In this situation, the employee would meet the definition of a whistleblower under Section 922(a) because he complained to the SEC.

In fact, that a Dodd-Frank whistleblower might also lodge an internal complaint is not uncommon at all.

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[3] In fact, tips to the SEC from Dodd-Frank bounty hunters hit an all time high in fiscal year 2016. The SEC's Office of the Whistleblower received 4,218 whistleblower "tips", up 7.6 percent over fiscal year 2015 and a new all-time high. SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, *available at* https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf (last visited Aug. 30. 2017).

The SEC created several incentives to encourage employees to report both internally and to the SEC. An employee may be eligible for a greater award from the SEC if the employee reports a potential securities law violation internally through his company's reporting procedures, then to the SEC (within 120 days of the internal report), and then the company, unaware of his report, voluntarily self-reports to the SEC. 17 C.F.R. § 240.21F-4(c)(3); 76 Fed. Reg. 34,299 (June 13, 2011). A whistleblower's voluntary participation in the company's internal compliance program is also a factor that can increase the amount of his award. 17 C.F.R. § 240.21F-6(a). On the other hand, if the SEC finds that the whistleblower interfered with internal compliance and reporting, it can use that to decrease the amount of his award. 17 C.F.R. § 240.21F-6(b).

In addition, *amicus* respectfully submits that employees are not shy about accessing internal complaint procedures while also lodging formal complaints with federal regulators. Under Title VII, for instance, an employee alleging discrimination on the basis of race must file an administrative charge with the Equal Employment Opportunity Commission before proceeding to federal court. 42 U.S.C. § 2000e-5. Employees often do so after having first sought a more informal resolution through their employers' dispute resolution mechanism. This is particularly true for current employees who simply seek to resolve their disputes quickly and quietly.

Nevertheless, in enacting Dodd-Frank, Congress recognized that there is substantial risk for an employee to blow the whistle on her employer to the SEC. S. Rep. No. 111-176, at 110 (2010). It is telling that the SEC put into place Dodd-Frank reporting

incentives that do not exist in the SOX context. Along with the potential for an extra reward if the SEC uncovers a violation, there are specific provisions for keeping the reporting employee's name anonymous throughout its proceedings.

Not only is the language of Section 922(a) unambiguous, but the legislative history confirms that Congress's intention was only to protect individuals who report alleged securities law violations to the SEC.

### E. Even If This Court Finds That The Statutory Language Is Ambiguous, The SEC's Interpretation Is Not Entitled To Judicial Deference

Even if this Court finds that Section 922(a)'s anti-retaliation protections are not unambiguously limited to "whistleblowers," defined as individuals who report alleged securities law violations to the SEC, the SEC's regulatory interpretation is not entitled to deference because the agency did not properly engage in notice-and-comment rulemaking, and its interpretation is altogether unpersuasive in any event.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court established a two-step analysis for analyzing a federal agency's construction of a statute. First, the court will look at whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, effect must be given to the unambiguously expressed intent of Congress. *Chevron*, 467 U.S. at 842-43 (footnote omitted). See also *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citations omitted); *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Courts thus must "presume that a legislature says in a

statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

If the court finds the language of the statute is ambiguous, it will examine, under step two, "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). Where the agency's construction is unreasonable, *Chevron* authorizes courts to reject it. *Dep't of the Treasury, IRS v. Fed. Labor Relations Auth.*, 494 U.S. 922, 928 (1990) (applying *Chevron* framework and rejecting agency interpretation as "not reasonable"). "[D]eference is not equivalent to acquiescence ...." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 30 (D.C. Cir. 1998). See *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions"); *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress"), *quoted in Holly Farms Corp. v. NLRB*, 517 U.S. 392, 410 (1996) (O'Connor, J., concurring in the judgment in part and dissenting in part).

Notably, the *Chevron* framework does not apply to judicial review of all agency actions, but only to those for which "it appears that Congress delegated authority to the agency generally to make rules carrying the

force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). If the regulation is "procedurally defective," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (citation omitted), the agency's view is, at most, "eligible to claim respect according to its persuasiveness." *Mead Corp.*, 533 U.S. at 221 (citing *Skidmore*). The weight given to the agency's view "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

### 1. The SEC's Section 922(a) final regulation was not subject to notice-and-comment rulemaking, rendering it unsuitable for *Chevron* deference

In enacting Dodd-Frank, Congress gave the SEC rulemaking authority to implement Section 922(a), which is a "very good indicator" that Congress intended any regulation promulgated pursuant to that authority to carry the force of law. *Mead Corp.*, 533 U.S. at 229-30. Acting on that authority, the SEC on November 3, 2010 published for public comment a proposed rule implementing Dodd-Frank's whistleblower anti-retaliation provision. The proposed rule provided:

> (a) You are a whistleblower if, alone or jointly with others, you provide the Commission with information relating to a potential violation of the securities laws. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.

> (b) The retaliation protections afforded to whistleblowers by the provisions of paragraph (h)(1) of Section 21F of the Exchange Act (15 U.S.C. [§] 78u-6(h)(1)) apply irrespective of whether a whistleblower satisfies the procedures and conditions to qualify for an award. Moreover, for purposes of the anti-retaliation provision of paragraph (h)(1)(A)(i) of Section 21F, 15 U.S.C. [§] 78u-6(h)(1)(A)(i), the requirement that a whistleblower provide "information to the Commission in accordance" with Section 21F (15 U.S.C. [§] 78u-6) is satisfied if an individual provides information to the Commission that relates to a potential violation of the securities laws.
>
> (c) To be eligible for an award, however, a whistleblower must submit original information to the Commission in accordance with the procedures and conditions described in §§ 240.21F-4, 240.21F-8, and 240.21F-9 of this chapter.

SEC, *Proposed Rules for Implementing the Whistleblower Protections of Section 21F of the Securities and Exchange Act of 1934*, 75 Fed. Reg. 70,487, 70,519 (Nov. 17, 2010). The SEC's proposed rule mirrored the definition of whistleblower in the statute and made clear that a whistleblower was protected from retaliation even if his report to the SEC did not qualify for an award. The SEC gave the public 45 days to comment.

On June 13, 2011, the agency published its final rule, which unlike the earlier proposal provided that individuals who report internally, but not to the SEC, are protected under Section 922(a)'s anti-retaliation provision. SEC, *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,299, 34,300-04, 34,363 (June 13, 2011). The rule went into effect 60

days after it was published in final form, without an opportunity for public comment.[4]

Without explanation, the SEC issued a final rule so different from the language in the proposed rule that it should have been subjected to a period of public notice and comment. Because it was not, it cannot be considered a legislative rule carrying the force and effect of law. See *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (interpretive rules are "issued ... to advise the public of the agency's construction of the statutes and rules which it administers, do not require notice-and-comment rulemaking, and do not have the force and effect of law") (citations and internal quotations omitted). Accordingly, it is not entitled to controlling deference by this Court.

### 2. The SEC's regulation is not entitled to *Skidmore* deference because it is inconsistent with the plain language of the statute and otherwise is unpersuasive

In *Skidmore*, this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. In determining what level of deference is

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[4] Following the Fifth Circuit's decision in *Asadi v. G.E. Energy (USA), LLC.*, 720 F.3d 620 (5th Cir. 2013), the SEC again issued interpretative guidance clarifying that Section 922(a)'s anti-retaliation provision covered internal whistleblowers. See SEC, *Interpretation of the SEC's Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934*, 80 Fed. Reg. 47,829 (Aug. 10, 2015).

to be accorded to administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (citations omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074; see also *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) ("Under *Skidmore*, we consider whether the agency has applied its position with consistency") (citations omitted). Such an approach "has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other." *Mead Corp.*, 533 U.S. at 228 (citations omitted).

As explained above, the SEC's interpretation of Section 922(a) is inconsistent with the plain language of the statute and Congressional intent, and therefore should hold no weight with this Court. Congress has spoken directly to the precise question at issue, both in Section 922(a)'s text and in the title and caption of its anti-retaliation provision. 15 U.S.C. § 78u-6(h)(1)(A). Congress left no "gap" for the agency to fill. Cf. *Chevron*, 467 U.S. at 843. "Where Congress has established a clear line, the agency cannot go beyond it ...." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 133 S. Ct. 1863, 1874 (2013). See also *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 42 (1990) (concluding that "[b]ecause we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation") (footnote omitted).

Furthermore, the SEC's interpretation is not consistent with any longstanding agency interpretations,

and in fact contradicts the agency's initial construction as well as its sub-regulatory guidance on its website and elsewhere, regarding what the term "whistleblower" means in this context. On its Office of the Whistleblower webpage, the SEC provides guidance on the scope of Section 922(a).[5] It recognizes that the whistleblower program was established to encourage reporting to the SEC and that there are different protections for individuals who report externally to the SEC under Dodd-Frank, and those who report internally under SOX. In its "Frequently Asked Questions," the SEC addresses the purpose of Dodd-Frank's whistleblower program and an employee's rights if his employer retaliates against him for submitting information to the SEC.[6] The SEC asks the following questions and provides the following answers:

> **What is the SEC Whistleblower Program?**
>
> The Whistleblower Program was created by Congress to provide monetary incentives for individuals to come forward and report possible violations of the federal securities laws to the SEC. ...
>
> The Program also prohibits retaliation by employers against employees who provide us with information about possible securities violations.[7]

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[5] https://www.sec.gov/about/offices/owb/owb-faq.shtml (last visited Aug. 30, 2017).

[6] *Id.*

[7] https://www.sec.gov/about/offices/owb/owb-faq.shtml#P2_764 (last visited Aug. 30, 2017).

**What rights do I have if my employer retaliates against me for submitting information to the SEC?**

Employers may not discharge, demote, suspend, harass, or in any way discriminate against you because of any lawful act done by you in providing information to us under the whistleblower program or assisting us in any investigation or proceeding based on the information submitted. If you believe that your employer has wrongfully retaliated against you, you may bring a private action in federal court against your employer. If you prevail, you may be entitled to reinstatement, double back pay, litigation costs, expert witness fees, and attorneys fees. The Commission can also take legal action in an enforcement proceeding against any employer who retaliates against a whistleblower for reporting information to us. See Rule 21 F-2.

Also, under the Sarbanes-Oxley Act, you may be entitled to file a complaint with the Department of Labor if you are retaliated against for reporting possible securities law violations, including making internal reports to your company. For more details please see the OSHA Fact Sheet on filing whistleblower complaints under the Sarbanes-Oxley Act.

SEC, Office of the Whistleblower, Frequently Asked Questions: No. 15.[8] The SEC explains that if an employee is retaliated against for providing information to the SEC or assisting the SEC in any investigation, the employee may bring a private right of action in

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[8] *Available at* https://www.sec.gov/about/offices/owb/owb-faq.shtml#P40_9612 (last visited Aug. 30, 2017).

federal court. 15 U.S.C. § 78u-6(h)(1)(B). It goes on to explain that under SOX, the employee may be entitled to file a complaint with the Department of Labor if he is retaliated against for making an internal report. The SEC does not mention any Dodd-Frank remedies for internal complainants. SEC, Office of the Whistleblower, Frequently Asked Questions: No. 15.[9]

If the Government's head-spinning change in position were accorded any deference, then other agencies would be free to invent, misconstrue, imagine and implement statutory constructions exceeding, perhaps even intentionally, the limitations imposed by Congress itself, and judicial review would be merely a *check-off* rather than a *check*.

## II. PERMITTING INTERNAL COMPLAINANTS TO PURSUE A CAUSE OF ACTION UNDER THE DODD-FRANK ACT WOULD PRODUCE UNJUST RESULTS

### A. Employees Who File Internal Complaints Already Are Protected By SOX

SOX provides that an employer cannot retaliate against an employee because the employee:

> provide[s] information, cause[s] information to be provided, or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or

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[9] *Available at* https://www.sec.gov/about/offices/owb/owb-faq.shtml#P40_9612 (last visited Aug. 30, 2017).

> assistance is provided to or the investigation is conducted by –
>
> ***
>
> (C) a person with supervisory authority over the employee (or such other person working for the employer who has authority to investigate, discover or terminate misconduct) ....

18 U.S.C. § 1514A(a)(1). Unlike Dodd-Frank, SOX explicitly protects whistleblowers who report suspected fraud internally to their employers. Thus, interpreting Dodd-Frank's retaliation protections as limited to those who report suspected violations to the SEC in no way would affect the rights of internal complainants under SOX. It would impose significant hardships on employers, however.

### B. Employers Would Face Substantial, Unjustified Burdens If Internal Complainants Were Permitted To File A Cause Of Action Under Section 922(a) Of Dodd-Frank

While permitting internal complainants to invoke Dodd-Frank would be extremely beneficial to the employee, it would expose employers to substantial risk, including the possibility of having to defend one set of allegations simultaneously in three fora with different remedial and enforcement schemes: (1) in federal court, (2) before the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), which has the authority to investigate SOX retaliation complaints, 29 C.F.R. § 1980.104, and (3) before the SEC, which has authority to investigate the underlying alleged securities law violations. 15 U.S.C. § 7215. The monetary cost alone to defend these three actions could be astronomical. But the

employer also likely would face other significant costs, including productivity costs associated with having to prepare for and participate in these investigations and litigation – such as sitting for interviews and depositions, and assisting with responses to discovery requests, motions practice, and conferences.

Consider the following example:

> Mary believes that Company A is engaged in securities fraud and she reports her suspicions to Company A's internal audit committee on October 1, 2015. Two weeks later, Mary is terminated. One week after her termination, Mary reports the alleged securities fraud to the SEC for the first time. Mary believes that she was terminated because of her internal complaint and so she files a charge with OSHA under SOX. In December 2016, OSHA concludes its investigation finding no retaliation by Company A.[10] Mary is not satisfied with this result and files suit in federal court under Dodd-Frank. During this time, her employer has also been subject to an investigation by the SEC.

Mary would not be considered a "whistleblower" under Section 922(a) because she did not report to the SEC before her termination. Under the Ninth Circuit's construction, however, she nevertheless would be entitled to invoke Dodd-Frank's anti-retaliation protections, including waiting up to six years to file a

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[10] Alternatively, if OSHA does not issue a final decision within 180 days after Mary files her complaint, she may file an action in federal court. In that instance, it is conceivable that OSHA could continue to investigate Company A even after Mary has filed a federal lawsuit. See *EEOC v. Union Pac. R.R. Co.*, __ F.3d _ , 2017 WL 3483345 (7th Cir. Aug. 15, 2017).

suit in federal court. On the other hand, Company A could be forced to defend itself in three separate fora: in an OSHA investigation, in federal court under SOX, and Section 922(a) of Dodd-Frank, and in an SEC investigation of Mary's underlying allegations raised after her termination.

If given a choice between the two, most employees would prefer to proceed under Dodd-Frank, which provides no administrative exhaustion requirement, a much longer statute of limitations, and an exponentially higher potential monetary recovery. See 15 U.S.C. § 78u-6(h)(1)(C). This type of forum-shopping could not have been the intent of Congress when it enacted Dodd-Frank.

## CONCLUSION

Accordingly, the decision below should be reversed.

Respectfully submitted,

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